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No. 94-1613

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# In the Supreme Court of the United States

OCTOBER TERM, 1994

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AMERICA'S BEST QUALITY COATINGS CORPORATION (ABQC), PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1995

## QUESTIONS PRESENTED

1. Whether the National Labor Relations Board (Board) acted within its remedial discretion in ordering petitioner to bargain with the union.

2. Whether the delay in counting election ballots caused by the Board's decision to consolidate the hearing on ballot challenges with the hearing on unfair labor practice charges violated the Due Process Clause.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 44 F.3d 516. The opinions of the National Labor Relations Board (Pet. App. 20a-36a) and the administrative law judge (Pet. App. 37a-99a) are reported at 313 N.L.R.B. 470.

### JURISDICTION

The judgment of the court of appeals was entered on January 4, 1995. The petition for a writ of certiorari

was filed on April 3, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Since June 1990, petitioner has operated a metal plating plant in Milwaukee, Wisconsin. Pet. App. 2a. Petitioner hired an employment agency, Staff Right, Inc., to supply it with employees. *Id.* at 3a. During its first several months of operation, petitioner promised its employees pay raises and additional vacation time, effective after one year of employment. *Id.* at 2a-3a. In March 1991, petitioner's employees became concerned about the status of the promised raises and vacation time. *Id.* at 3a. As a result, several employees contacted the United Electrical, Radio and Machine Workers of America (Union) and began circulating an organizing petition. *Id.* at 2a-3a. Thirty-three employees signed the petition. *Id.* at 3a.

By April 18, 1991, a majority of petitioner's employees had signed authorization cards designating the Union as their bargaining representative. Pet. App. 3a. That same day, a group of employees and Union representatives asked petitioner to recognize the Union voluntarily, but petitioner refused to do so. *Ibid.* The Union then filed a representation petition with the National Labor Relations Board (Board). *Ibid.* An election was scheduled for June 21, 1991. *Id.* at 43a.

The day after the Union filed the representation petition, petitioner's president, Robert Peterson, announced that petitioner was transferring all employees to the payroll of Staff Right for an indefinite period. Pet. App. 3a. Peterson's announcement frightened the employees because it led them to believe that they were only temporary employees. *Ibid.*

Shortly after Peterson's announcement, supervisor Keith Stanosz told several employees that petitioner "was trying to scare [the employees] off of the Union" by transferring them to Staff Right's payroll. *Id.* at 67a.

Petitioner also engaged in other tactics that were designed to thwart unionization efforts. Pet. App. 4a. For example, just before the cut-off date for eligibility to vote in the representation election, petitioner hired eight new employees it believed were likely to vote against the Union. *Id.* at 4a, 78a-79a. In addition, in the days leading up to the election, petitioner's officials questioned employees about their union views and threatened to enforce stricter working conditions if the employees voted for the Union. *Id.* at 4a. President Peterson personally questioned one employee about his union views. *Id.* at 22a-23a. Peterson also required an employee to remove a pro-union leaflet, while not requiring the removal of an anti-union sign. *Id.* at 4a. Four days before the election, Peterson informed employees that petitioner could not provide any raises or change vacation schedules because the election was pending. *Ibid.* Peterson told employees they would receive their raises and paid vacations "down the road." *Id.* at 75a. At the June 21, 1991 election, the employees voted 30 to 29 in favor of the Union, with nine challenged ballots. *Id.* at 4a.

On July 18, 1991, a group of employees, led by employees Proffitt, Mills, and Nixon, presented Peterson with a petition demanding the raises and paid vacation time previously promised. Pet. App. 4a. Later that day, someone caused an unauthorized drainage of acid from storage tanks in the plant. *Id.* at 5a. The next day, Peterson laid off all first-shift employees in the plating department. *Ibid.* Peterson in-

formed the employees that they had engaged in "misconduct" by demanding their promised benefits and causing the drainage of acid. *Id.* at 56a. On July 22, employees began picketing at the plant to protest the mass layoff. *Id.* at 5a.

On July 27, 1991, petitioner began to reinstate employees. Pet. App. 5a. Petitioner recalled less senior employees ahead of members of the union organizing committee. *Ibid.* Petitioner then notified employees that it had decided to grant eligible employees merit wage reviews and vacation time. *Ibid.*

In September 1991, petitioner issued a handbook to the employees, which reflected numerous unilateral changes in their terms and conditions of employment. Pet. App. 6a. Thereafter, petitioner discharged Proffitt, Mills, and Nixon. *Id.* at 5a-6a. Petitioner claimed that Proffitt and Mills were involved in the acid-drainage incident and that Nixon had failed a required drug test. *Ibid.*

2. On May 1, 1992, the Board's General Counsel issued an unfair labor practice complaint against petitioner. Pet. App. 38a. After a hearing, an administrative law judge (ALJ) found petitioner guilty of numerous unfair labor practices. *Id.* at 91a-95a. First, the ALJ found that petitioner violated Section 8(a)(1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1), by transferring employees to Staff Right's payroll in order to discourage union support, interrogating employees concerning their union sympathies, and threatening employees with loss of benefits and more onerous working conditions. Pet. App. 91a-92a. Second, the ALJ found that petitioner violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by laying off first-shift employees in retaliation for their union activity, delaying the recall

of pro-union employees, and discharging Mills, Proffitt, and Nixon, because of their union activity. Pet. App. 92a. Third, the ALJ found that petitioner violated Section 8(a)(1), (3), and (5) of the Act, 29 U.S.C. 158(a)(1), (3), and (5), by failing to implement promised wage increases and vacation time prior to the election, and then suddenly granting those benefits afterwards. *Ibid.* Finally, the ALJ found that petitioner violated Section 8(a)(1), (3), and (5) of the Act by unilaterally changing the terms and conditions of employment. Pet. App. 92a-93a.

Applying this Court's decision in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), the ALJ recommended that the Board order petitioner to bargain with the Union. Pet. App. 89a-90a. The ALJ explained that petitioner's conduct "is so serious and substantial in effect that a fair election untainted by the undermining impact of [petitioner's] discriminatory conduct would be unlikely." *Id.* at 89a-90a.[1]

3. The Board affirmed the ALJ's unfair labor practice findings. Pet. App. 21a. The Board also adopted the ALJ's recommendation that it issue a *Gissel* bargaining order. *Id.* at 26a. Like the ALJ, the Board found that "[petitioner's] course of misconduct, both pre and postelection, clearly demonstrates that the holding of a fair election in the future would be unlikely." *Ibid.*

In reaching that conclusion, the Board emphasized that President Peterson's announcement of the transfer of employees to Staff Right's payroll was

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[1] The ALJ also determined that five of the nine challenged ballots should be opened and counted, and that petitioner's conduct justified setting aside the election. Pet. App. 48a-55a, 91a; see note 2, *infra*.

intended "to impress upon employees that [petitioner] controlled their employment to the exclusion of any outside organization that might attempt to improve their working conditions." Pet. App. 27a-28a. The Board also took into account the fact that petitioner's officials had interrogated and threatened employees in the critical preelection period. *Id.* at 27a. The Board also deemed it significant that petitioner first denied employees expected wage reviews and paid vacations before the election, and then granted such benefits afterwards. *Id.* at 28a. The Board noted that such "fist inside the velvet glove" tactics "are particularly lasting in their effect on employees." *Ibid.* Finally, the Board stressed that the "discriminatory layoff of all 21 day shift plating department employees, the delayed recall of those with suspected union sympathies, and the unlawful discharges of 3 leading union adherents were also highly coercive and unlikely to be forgotten." *Ibid.* That conduct "directly affected approximately one-third of the bargaining unit," the Board explained, and its likely result was "to reinforce the employees' fear that they would lose employment if they persisted in union activity." *Ibid.*

The Board rejected petitioner's contention that a bargaining order was inappropriate because of employee turnover. Pet. App. 29a. The Board stated that "employee turnover is an irrelevant consideration when assessing the propriety of issuing a *Gissel* bargaining order." *Ibid.* "[E]ven assuming that employee turnover would be a relevant factor in an appropriate case," the Board concluded, "this is not such a case," because "there is a 'clear causal connection' between the turnover in the unit and [petitioner's] illegal conduct of laying off the day shift

plating department and delaying the recall of employees most likely to have been union supporters." *Ibid.* Finally, the Board rejected petitioner's assertion that a bargaining order was inappropriate under *Impact Industries, Inc.* v. *NLRB*, 847 F.2d 379 (7th Cir. 1988), where the court remanded a *Gissel* bargaining order that was issued by the Board more than seven years after the election. Pet. App. 29a n.8. Here, the Board noted, there was no comparable delay in issuing the bargaining order. *Ibid.*[2]

5. The court of appeals enforced the Board's order. Pet. App. 1a-17a. The court pointed out that "[petitioner] does not appeal the unfair labor practice findings, but rather only challenges the Board's bargaining order as an improper remedy." *Id.* at 7a. After noting that the Board has "broad discretion" to devise appropriate remedies, *id.* at 8a, the court concluded that the Board had not abused that discretion here. *Id.* at 12a. The court stated that "[g]iven both the ALJ's and Board's findings, we will not disturb the conclusion that [petitioner's] actions rise to the level of misconduct that merits the imposition of a bargaining order as part of the remedy." *Ibid.*

The court rejected petitioner's contention that the passage of time and employee turnover made the bargaining order inappropriate. Pet. App. 13a. The court explained that "there were no extreme gaps in

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[2] The Board instructed the Regional Director to open and count the five ballots as to which challenges had been overruled, to certify the Union if the revised tally of ballots reflected a Union victory, but to set aside the election if it did not. Pet. App. 32a-33a. Because the revised tally showed that the Union lost the election 34-30, the Regional Director set aside the election. *Id.* at 19a.

time which would render the Board's order stale." *Ibid.* The court noted that the election occurred in June 1991, the ALJ issued his opinion in March 1993, and the Board issued its decision in November 1993. *Ibid.* "While we recognize the concerns over stale orders and changed circumstances," the court stated, "we also acknowledge the ordinary institutional time lapses inherent in the legal process." *Id.* at 14a.

**ARGUMENT**

The court of appeals correctly rejected petitioner's contention that the Board abused its discretion in ordering petitioner to bargain with the Union. The court's conclusion does not conflict with the decision of any other court of appeals. Review by this Court therefore is not warranted.

1. In *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 613-614 (1969), this Court held that the Board has authority to order an employer to bargain with a union when a majority of employees has signed union authorization cards, and "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight." *Id.* at 614. The Court rejected the view that such an order conflicts with the principle of majority rule. The Court explained that authorization cards can accurately reflect employee sentiment (*id.* at 603), and that employees who wish to disavow the union can do so by filing a representation petition. *Id.* at 613. The Court also emphasized that the Board's issuance of a bargaining order is "based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity" and "its choice of

remedy must therefore be given special respect by reviewing courts." *Id.* at 612 n.32.

a. Petitioner contends (Pet. 13-15) that the Board abused its discretion in issuing a bargaining order because petitioner's conduct was not sufficiently serious to prevent the holding of a fair rerun election. That fact-bound contention is without merit.

In concluding that a bargaining order was appropriate, the Board first focused on the fact that the day after the Union demanded recognition, President Peterson announced the transfer of employees to Staff Right's payroll. Pet. App. 26a-27a. The Board found that Peterson timed that announcement in order to frighten petitioner's employees and to "impress upon [them] that [petitioner] controlled their employment to the exclusion of any outside organization." *Id.* at 27a-28a. The Board also took into account the fact that, in the critical preelection period, petitioner's officials interrogated and threatened employees. *Id.* at 26a-27a. The Board also deemed it significant that petitioner had first denied the employees expected wage reviews and paid vacations before the election and then suddenly granted such benefits afterwards. *Id.* at 28a. The Board explained that such tactics "are particularly lasting in their effect on employees." *Ibid.* Finally, the Board stressed that the "discriminatory layoff of all 21 day shift plating department employees, the delayed recall of those with suspected union sympathies, and the unlawful discharges of 3 leading union adherents were also highly coercive and unlikely to be forgotten." *Ibid.* Based on those findings, the Board reasonably concluded that "[petitioner's] course of misconduct, both pre and post-election, clearly demonstrates that the holding of a

fair election in the future would be unlikely." *Id.* at 26a.

Petitioner contends (Pet. 13) that its misconduct was "no worse" than that of employers in cases where courts have deemed a rerun election, rather than a bargaining order, to be the appropriate remedy. Petitioner's misconduct, however, was much more egregious than that of the employer in *J.J. Newberry Co.* v. *NLRB*, 645 F.2d 148, 151 (2d Cir. 1981), where the court found that the employer's violations were limited to three instances of employee interrogation and the granting of a wage increase. Nor can petitioner's misconduct be equated with that of the employer in *NLRB* v. *Amber Delivery Service, Inc.*, 651 F.2d 57 (1st Cir. 1981). There, the court found that the employer's conduct involved interrogation with no threat of reprisal, changes in working conditions the employer mistakenly believed were lawful, and one-day suspensions. *Id.* at 59. The other cases cited by petitioner (Pet. 13-14) are inapposite. In those cases, the courts declined to enforce the Board's bargaining order for reasons other than the lack of severity of the employer's misconduct. See *NLRB* v. *Knogo Corp.*, 727 F.2d 55, 60-61 (2d Cir. 1984) (denying enforcement because of passage of time and employee turnover); *NLRB* v. *Apple Tree Chevrolet, Inc.*, 671 F.2d 838, 841 (4th Cir. 1982) (denying enforcement due to lack of findings by Board as to necessity for bargaining order); *NLRB* v. *Vemco, Inc.*, 989 F.2d 1468, 1488 (6th Cir. 1993) (denying enforcement because union had not achieved majority status in the unit); *Conair Corp.* v.

*NLRB*, 721 F.2d 1355 (D.C. Cir. 1983) (same), cert. denied, 467 U.S. 1241 (1984).[3]

b. Petitioner's principal contention (Pet. 17-21) is that the Board erred in failing to consider whether employee turnover and the passage of time made it inappropriate to issue a bargaining order. In fact, however, the Board examined both factors and reasonably determined that they did not militate against the issuance of a bargaining order.

The Board specifically found "'a clear causal connection' between the turnover in the unit and [petitioner's] illegal conduct." Pet. App. 29a. The Board acted within its remedial discretion in refusing to give weight to employee turnover in these circumstances. As the Board concluded (*ibid.*), an employer should not be permitted to profit from its own wrongdoing. See *NLRB* v. *Gordon*, 792 F.2d 29, 34 (2d Cir.), cert. denied, 479 U.S. 931 (1986) (employee turnover caused by employer misconduct does not militate against a bargaining order); *NLRB* v. *So-Lo Foods, Inc.*, 985 F.2d 123, 128-129 (4th Cir. 1992) (same); *Texas Petrochemicals Corp.* v. *NLRB*, 923 F.2d 398, 404 (5th Cir. 1991) (delay caused by employer does not militate against a bargaining order). While petitioner asserts (Pet. 21)

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[3] Petitioner questions (Pet. 11) the Board's reliance on its post-election misconduct. An employer's post-election retaliation against employees for engaging in protected organizing activity, however, "is surely a serious unfair labor practice tending to prejudice a fair rerun" election. *NLRB* v. *Drives, Inc.*, 440 F.2d 345, 367 (7th Cir.), cert. denied, 404 U.S. 912 (1971). Accordingly, such post-election violations are "always relevant" in determining whether a bargaining order should issue. *Chromalloy Mining & Minerals* v. *NLRB*, 620 F.2d 1120, 1131 n.8 (5th Cir. 1980); accord *Hedstrom Co.* v. *NLRB*, 629 F.2d 305, 311 (3d Cir. 1980), cert. denied, 450 U.S. 996 (1981).

that the employee turnover in this case "resulted [from] natural turnover of employees who left regardless of the alleged unfair labor practices," the Board's contrary factual finding, which was undisturbed by the court of appeals, raises no issue warranting further review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

The Board found that passage of time did not militate against a bargaining order because there was no delay of unusual duration. Pet. App. 29a n.8. The Board did not abuse its discretion in reaching that conclusion. The election occurred in June 1991, the ALJ issued his opinion in March 1993, and the Board issued its decision in November 1993. *Id.* at 13a. Thus, as the court of appeals explained, the time sequence in this case amounted to "ordinary institutional time lapses inherent in the legal process." *Id.* at 14a. There were not any "extreme gaps of time which would render the Board's order stale." *Id.* at 13a-14a.

Petitioner contends (Pet. 19-20) that the Board's view on the relevance of turnover and delay conflicts with that of many courts of appeals. In the circumstances presented by this case, however, there is no such conflict. The cases cited by petitioner (*ibid.*) hold that natural turnover is a factor that can militate against a bargaining order. None of those cases suggests that the Board must consider turnover as a mitigating factor where, as here, it is directly caused by the employer's misconduct. Similarly, while the cases relied upon by petitioner hold that inordinate delay can be a factor militating against a bargaining order (*ibid.*), no case suggests that ordinary insti-

tutional time lapses, such as those at issue here, preclude a bargaining order.[4]

2. Petitioner contends (Pet. 25-29) that the Board's delay in resolving this case violated the Due Process Clause. Petitioner failed to raise that objection before the Board, however, and therefore is jurisdictionally barred from asserting it in this Court. See Section 10(e) of the Act, 29 U.S.C. 160(e); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

In any event, petitioner's contention is without merit. Petitioner argues (Pet. 26) that the Board acted unreasonably in consolidating the election ballot challenges with the hearing on the unfair labor practice charges. Because the validity of the election depended on resolving both issues, however, it was entirely reasonable for the Board to consolidate them. Such an exercise of discretion in conducting administrative proceedings does not remotely approach a due process violation.

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[4] As petitioner notes, unlike other courts that have discussed the issue, the Ninth Circuit has indicated that it will not require the Board to consider passage of time and employee turnover in deciding whether to issue a *Gissel* bargaining order. *NLRB* v. *Bakers of Paris, Inc.*, 929 F.2d 1427 (1991). This is not an appropriate case, however, to resolve that conflict. Because the Board considered employee turnover and passage of time and reasonably determined that they should not preclude a bargaining order on the facts of this case, petitioner's challenge to the Board's bargaining order would fail in every circuit. In addition, while petitioner contends (Pet. 21-25) that there is inconsistency among decisions *within* several courts of appeals on the relevance of turnover and delay, intra-circuit discrepancies do not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 901-902 (1957).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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